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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

KEYSTONE STEEL & WIRE COMPANY AND INDEPENDENT STEEL WORKERS ALLIANCE,
Respondents.

BRIEF OF RESPONDENT, INDEPENDENT STEEL WORKERS ALLIANCE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported at 155 F. 2d 553 (B. A. 208-220)[1]

The findings of fact, conclusions of law and Order of the National Labor Relations Board are found at P. A. 98-134.

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1. The record in this case consists of the appendices to the Briefs filed by the parties hereto in the Court below (herein designated as "P. A." for Petitioner's Appendix and "B. A." for Board's Appendix).

JURISDICTION.

The decree of the Circuit Court of Appeals was entered April 2, 1946 (B. A. 20). The Board's petition for rehearing was denied June 27, 1946 (B. A. 222). The Petitioner has filed its Petition for Writ of Certiorari under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act. The Court is asked, in the Petition filed by the Board, to review the decision of the United States Circuit Court of Appeals for the Seventh Circuit, herein above designated.

STATEMENT OF THE CASE.

The respondent herein deems it necessary to make an additional statement of the case because of the inaccuracy and omissions in the statement made by the Petitioner herein.

This case had its inception in the filing of a charge in February of 1943 by United Farm Equipment & Metal Workers of America, affiliated with the C. I. O., hereinafter designated as the Union, charging the Company with unfair labor practices in its relations with this respondent, Independent Steel Workers Alliance, hereinafter designated as the Alliance. First and second amended charges were filed by the Union in July of 1943, a third amended charge was filed by the Union in April of 1944 and a fourth amended charge was filed by the Union during the hearing of this case before the Examiner in the year 1944. Complaint was filed by the Regional Director on April 8, 1944 (P. A. 9-12). The Alliance filed its Motion to Intervene in the proceedings before the Examiner, which Motion was allowed. The Intermediate report of the Examiner, together with his recommendations, were filed on September 3, 1944 (P. A. 37-72). Exceptions to the report were filed by the Alli-

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ance and overruled by the Board. The decision and Order of the Board were filed June 22, 1945 (P. A. 98-135). The Alliance filed its Petition for review of the Board's decision in the United States Circuit Court of Appeals, Seventh Circuit (P. A. 135-150), asking that the Order of the Board be vacated. The Circuit Court of Appeals, in passing on this case on April 2, 1946 (See Opinion B. A. 208-220), set aside the decision of the Board. The Board's Petition for Rehearing was denied June 27, 1946 (B. A. 222).

THE EVIDENCE:

In 1933, the Keystone Employees' Association (hereinafter referred to as KEA) an organization of employees of Keystone, was formed. This was prior to the passage of the National Labor Relations Act. The KEA had no dues or initiation fees. Though legal, when formed, it had objectional features, as a Bargaining Agent, after the passage of the National Labor Relations Act. Some time, in the latter part of March or first part of April of 1937, D. P. Sommer, the Vice-President and General Manager of the Company, at a meeting with the Officers of the KEA, informed them that the Company would no longer bargain with or recognize the KEA as the Bargaining Agent of its employees because, as it existed, it violated the Act (P. A. 220-222). At such meeting, no one present discussed or suggested a new Labor Organization (P. A. 223, 328). This is undisputed. Within a few days after this meeting, the Officers of the KEA reported to a meeting of the General Committee of the KEA the result of their meeting with D. P. Sommer (P. A. 320). At this latter meeting, the General Committee of KEA, which was its Governing Committee and composed of representatives from each department in the Plant, voted to dissolve the KEA and the former officers of KEA were instructed to notify the

Company of such dissolution (P. A. 322, 413, 430). At this meeting, there was some discussion of a new organization but no action was taken. When this meeting closed, no one present was charged with any duty or was selected to do anything on behalf of any new organization of employees (P. A. 322, 430). No action by any former Committeeman or Officer of the KEA was taken subsequent to the dissolution meeting and the report of the action of the General Committee to D. P. Sommer the day following such meeting of General Committee. On the day following the action of the General Committee of KEA in dissolving, D. P. Sommer, Vice-President of the Company, was told of the action of the General Committee on the preceding day and of the dissolution of the KEA and some cabinets and equipment, owned by the Company and used by the KEA, were turned back to the Company, together with the key to a small room used as an Office (P. A. 324). This was the last act of KEA. It was a matter of common knowledge immediately, among the employees, that KEA was dissolved and the reason therefor and that there was no Labor Organization representing the employees. These facts were openly discussed among the employees throughout the Plant and various Departments thereof. (P. A. 207, 214, 268, 272, 277, 281, 283, B. A. 151, P. A. 283). About two weeks after the dissolution meeting of the KEA, a group of employees called and held a meeting of Company Employees at Heitzman Hall, in Bartonville, to discuss the question of an organization of employees. (P. A. 328). The Hall was off Company premises and the Company knew nothing of this meeting. This meeting was prompted because there was no organization of employees of the Company and grievances were arising among employees. At this meeting, plans were made for another meeting in a few days, and it was decided to pass the word around among the employees so that each Department in the Plant would be represented.

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(P. A. 329). This latter meeting was held April 16, 1937 at Heitzman Hall, which was off the premises of the Company, and was attended by employees of the Company and, at such meeting, it was decided to have an Independent Employees' Organization; a committee was appointed to prepare a Constitution and By-Laws (P. A. 330, 415, 416) and April 21, 1937 fixed as the date of the next meeting. The next meeting was held April 21st, as planned, and Minutes of the meeting were kept (P. A. 587, 588). The Constitution and a portion of the By-Laws, as prepared by the committee, were read and approved at this meeting, which included the adoption of a name for the organization, Independent Steel Workers Alliance. Applications for membership were read and approved, temporary officers were authorized to rent a hall, to purchase furniture and have a telephone installed. (P. A. 333, 334, 587-589). A meeting on April 27, 1937 completed the details of the organization. (P. A. 589-592.) Minutes of further meetings of the General Committees and some of its Special Committees, to and including April 6, 1942, appear in Alliance's Exhibit I (P. A. 589-674). No representatives of the Company were ever present at any of these organizational meetings of the Alliance. (P. A. 337). On April 22, 1937, the Alliance wrote a letter to the Company, stating that it had, as its members, a majority of the employees of the Company and asking for a meeting with the management on April 28, 1937, also demanding recognition as the sole Bargaining Agent for its employees (P. A. 583, 584). Representatives of the Alliance met with the management on April 28, 1937 and demanded, and received, recognition as exclusive Bargaining Agent, representing a majority of Company employees. At this meeting, representatives of the Alliance had 970 signed Application Cards of members of the Alliance (P. A. 385); the total number of employees eligible to membership in

the Alliance, at that time, being approximately 1400 (P. A. 336). The Alliance has continued as the Bargaining Agent for the employees of the Company from April 28, 1937 to the present time, approximately ten years.

On May 17, 1937, a general election was held by the Alliance, at which meeting permanent officers and departmental committeemen were elected in an open and competitive election, participated in by the general membership of the Alliance. A detailed report of the result of this election, together with the vote cast for each candidate, appears in Bd.'d Exhibit 21 (P. A. 539). There were three candidates for President, four for Vice-President and three for Secretary-Treasurer. All received a substantial vote. This was in an open and competitive election. Thereafter, annual elections were held and officers and departmental committeemen were elected each year by the membership of the Alliance. The Alliance had a Constitution and By-Laws of a substantially different nature than those of KEA. The Alliance had dues and initiation fees. The KEA had none. The Alliance held no meetings on Company property (P. A. 341); from its inception, the Alliance paid its way and received nothing from the Company for which it did not pay. It rented an attic room from the Company for a period of a month and a half and paid $10.00 a month rent for it (P. A. 435, 725). This was used only during the period the office was being constructed in the Alliance Hall which had been rented by Alliance and which was off Company property. The Alliance bought, from the Company, certain office equipment and paid for same. (P. A. 431, 723). It paid the Company for the expense of deduction of dues from June, 1937 to the present date. (P. A. 434, 435). All employees of the Company, before becoming members of the Alliance, were required to sign an Application Card and if they desired to pay their dues

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by the "check-off" system, such employee also signed a written authorization permitting the Company to retain dues from pay checks each month. This system was optional with the individual employee (P. A. 517). The evidence discloses that the Alliance dropped from its membership those who became ineligible because of their promotion as foremen, or for any other reason, as soon as the Alliance learned of such facts (P. A. 727-730). The Alliance, since 1937, has been a militant organization. It developed a system for handling grievances, secured increases of wages, better working conditions and establishment of a system of seniority (P. A. 347-348); more liberal vacation pay plan (P. A. 350-395); an increase in employees' participation in the profit-sharing plan (P. A. 350-351). In 1944, the average hourly rate paid Company employees was 16¢ per hour higher than the average paid by Steel Industries in the United States (P. A. 247-248). The Alliance had, for some period prior to December, 1940, demanded that the Company sign a written contract with it, covering wages, hours and working conditions but the Company refused to sign same. They entered into verbal agreements but no written contracts. The Alliance prepared a written contract, embodying the verbal agreements, and tendered same to the Company before December 19, 1940 for its signature but the Company refused to sign it (P. A. 366, 367; Alliance Exhibit 6; P. A. 684-694). The Company agreed to, and did, incorporate, in the main, the provisions of the contract tendered by the Alliance and agreed upon by the Company and the Alliance, in a statement of its Labor Relations policy, published in December of 1940. A written contract between Alliance and Company was signed on February 11, 1943, Bd's Exhibit 33 (P. A. 557-572).

There was no Labor Organization, or attempts to organize one, other than the Alliance at the Keystone from

1937 until the Union (CIO) started its membership drive in June of 1942. Commencing with June, 1942, the Alliance and the Union conducted a spirited campaign for membership in their respective organizations. In 1940, because of solicitation, among its employees, for the sale of tickets and merchandise, the Company adopted a rule forbidding any solicitation on its premises. Both the Alliance and the Union, subsequent to June, 1942, distributed literature, wore membership buttons and talked to employees, in their efforts to get new members. The non-solicitation rule was not enforced by the Company except upon the specific complaint by an individual employee to the management (P. A. 215, 216, 240, 242, 262, 263). There was no change in the enforcement of this rule during the period from 1942 to the time of the hearing of the cause before the Examiner and the Company preserved a neutral policy and acted on the few isolated, specific complaints made by employees.

During the existence of KEA, it sponsored a baseball team called "Red Brands", a trade-name of the Company. The team was made up of Company employees. The Company furnished the grounds, lights and bleachers and the team, so sponsored, agreed to play at least four games in rural areas, near Peoria, each year so the Company would get the benefit of such advertising. The team, for a period of a year or so, charged admissions to its home games and had control of the confectionery concessions at its park. The team agreed, for the use of the grounds, to furnish balls and bats for the inter-departmental ball teams, representing the employees of the various departments of the Company and when KEA was dissolved, in 1937, it had, in its treasury, $228.53, which money had come from the ball team and which sum, under date of May 4, 1937, was turned over to the Alliance at the suggestion of the members of the ball team and em-

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ployees of the Company who had been active in supporting the team. The Company had no interest in, or control of, this fund (P. A. 312-313-316) and exercised no control over the concession rights at the ball park.

Upon these facts, the National Labor Relations Board rendered its decision, holding that the Alliance was a successor to KEA; that it was a Company dominated Union and ordering its disestablishment.

Upon these same facts, the United States Circuit Court of Appeals for the Seventh Circuit set aside the decision of the Board as not based upon substantial evidence.

The Petitioner herein, in its Petition, at Page 12 thereof, refers to an election proceedings held among the employees of the Company (65 N. L. R. B. 274). Prior to the decision of the National Labor Relations Board, in this case, Alliance had requested, many times, from the Regional Board of the National Labor Relations Board, an election but were informed, by such Regional Board, that no election could be held, with the Alliance on the ballot, as long as there were charges pending against the Company and the Alliance of unfair labor practices. Immediately after the decision of the National Labor Relations Board, ordering disestablishment of the Alliance, on Petition of the Union (C. I. O.), a direction of an election was entered by the National Labor Relations Board. This election was held on February 13, 1946 and while this case was pending, undetermined, before the United States Circuit Court of Appeals for the Seventh Circuit. In such election proceedings, the Alliance filed its Motion to Intervene and for an opportunity to have its name placed on the ballot and, in the alternative, that the holding of the election be stayed until a decision was made in the instant case by the United States Circuit Court of

Appeals for the Seventh Circuit. The Board denied the Petition of the Alliance *in toto* and the election was held on February 13, 1946, with the Alliance refused a place on the ballot. The Board conducted this election. On the ballot, the production and maintenance employees of the Keystone were given the opportunity to select either the C. I. O. or the International Association of Machinists as their Bargaining Agent or neither of said Unions. The result of this election, as certified by the Board on February 28, 1946, was as follows: Of 1305 valid votes cast, 270 were for C. I. O., 66 for the Machinists and 969 for neither the C. I. O. nor the Machinists and the Board ordered that the Petition, filed by C. I. O. for investigation and certification, be dismissed. In this election, the only opportunity for the employees of Keystone to express their preference for the Alliance was by their vote for neither C. I. O. nor the Machinists.

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REASONS FOR DENYING THE WRIT.

ARGUMENT.

I.

The Board, in its Petition, assigns, as the first reason why the Writ should be granted, that the decision rendered by the Seventh Circuit Court of Appeals, in the instant case, is in variance with the decisions of some of the other Circuit Courts of Appeals and of the Supreme Court. The Board, in its Petition filed herein, at Page 13, announces a rather unusual doctrine; that is that a labor organization is illegal and cannot act as a Bargaining Agent and must be disestablished, if, in its inception and beginning, it follows, within a short period of time, a prior labor organization which was illegal and in violation of the National Labor Relations Act. In other words, that the taint of illegality is on the second organization regardless of the fact that it may be a new organization and entirely separate and distinct from the old organization and independent of any Company domination whatever. This, we cannot believe is sound law. The real test in this case is, did the Circuit Court of Appeals, in its decision in this case, follow the accepted and well recognized proposition of law in its consideration of the case; namely, was the decision of the Board based upon substantial evidence? If the decision of the Board was not based upon substantial evidence, it was the duty of the Court of Appeals, in this case, to set aside the decision of the Board. The Court of Appeals for the Seventh Circuit, in its decision, in this case, states:

> "We are convinced that the findings are not supported by substantial evidence except wherein the Board finds that the Keystone is not guilty of illegally discharging the eight members of the C. I. O. Union." (B. A. 219).

In the case of *N. L. R. B.* v. *Sun Shipbuilding & Dry Dock Co.*, (3rd Cir.) 135 F. (2d) 15 at 25, the Court, in its opinion, states:

> "It is for a reviewing court to say whether the Board's findings are supported by substantial evidence and whether its conclusions are reasonably inferable from the evidence which it accredits."

Again, in the case of *Jacksonville Paper Co.* v. *N. L. R. B.* (5th Cir.) 137 F. (2d) 148 at 150, the Court said:

> "It is the province of the Board to determine whether words were spoken or acts were done. However, the legal effect of the words spoken or the acts done and a determination of whether or not they amounted to a violation of the act, may be a legal question and within the power of the Court to determine."

We find, in a very brief review of the cases cited by the Board, in its Petition, at Page 13 of the Petition, that these cases are in complete harmony with the doctrine of law upon which the Seventh Circuit decided the instant case; namely, that the Board's decision must be based upon substantial evidence. In the case of *Westinghouse Electric Co.* v. *National Labor Relations Board*, 112 F. (2d) 657, (C. C. A. 2), the Court uses this language, at Page 658:

> "An outline of the facts found, all of which have substantial' support in evidence, is as follows: * *"

At Page 660, the Court, in its decision, states:

> "If the Board's order had to depend alone upon the two acts of discrimination against the local,

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which we have confirmed it would somewhat tax our credulity to suppose that their effect was substantial." • • •

Again, in *Sperry Gyroscope Co., Inc.* v. *National Labor Relations Board,* 129 F. (2d) 922 (C. C. A. 2) the Court there said, at Page 924:

"Our function, says the Supreme Court, is narrowly limited to determining (a) whether there was substantial evidence to support the Board's findings of fact."

At Page 925, the Court continued:

"So that the question here, for us, is indeed narrow: Was there substantial evidence to support the Board's findings that a Union with which the Company contracted in June, 1939 was, at that time, dominated by the Company."

The case cited by Petitioner, *National Labor Relations Board* v. *Standard Oil Co.,* 138 F. (2d) 885 (C. C. A. 2) recognizes that a Court reviewing the decision of the Board does have power to determine whether or not there is substantial evidence to support the Board's findings of an order of disestablishment.

In the case cited by Petitioner, *Western Electric Co.* v. *National Labor Relations Board,* 147 F. (2d) 519 (C. C. A. 4), the Court, in its opinion at Page 521, uses this language:

"The crucial question in the instant case is whether the evidence supports the Board's finding that the Association is a successor to, and stands in the same position as, the Plan. By the terms of the Act, we are bound by the findings of the Board unless it can be said that those findings are unsupported by substantial evidence."

From the above, it can be seen that all Courts recognize the doctrine that the Board's finding must be based

upon substantial evidence and that it is the duty of a Reviewing Court only to uphold the Board's decisions when such Reviewing Courts are satisfied that the Board's findings are supported by substantial evidence; therefore, there is no basis for the Board's position in its Petition that the decision of the Seventh Circuit Court of Appeals, in the instant case, is at variance with the decisions of the Courts of other Circuits and of the Supreme Court. These various cases, decided by the various Courts, are based upon entirely different sets of facts and it would be humanly impossible to expect Courts, reviewing the decisions of the Board, to reach the same conclusions upon entirely separate, distinct and different sets of facts and circumstances. Naturally, a Reviewing Court, in one instance, might hold that there was substantial evidence to support the Board's finding and, in another case, because of the particular facts, decide that there was no substantial evidence to support the Board's findings.

The Board's position, in this case, that the Circuit Court of Appeals erred in its decision, is based on the theory that the Alliance was a successor organization to the KEA and that the Alliance was Company dominated and had the taint of illegality on it from the beginning and that there was substantial evidence in the record to support the Board's finding of such facts and of disestablishment. The Circuit Court of Appeals for the Seventh Circuit decided that there was no substantial evidence to support these findings of the Board. Two of our Circuit Courts of Appeals, in discussing the question of disestablishment, have arrived at what we believe to be a sound rule of law.

In the case of *E. I. Du Pont de Nemours & Co.* v. *N. L. R. B.*, (4th Cir.) 116 F. (2d) 388 at 399, the Court, in discussing the question of disestablishment, says:

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> "In concluding the discussion of our views on the 'disestablishment' phase of the instant case, we think it appropriate to observe that we do not regard 'disestablishment' in reference to labor organizations, as having any precise, technical meaning. * * * So long as the employees are publicly assured by the employer in genuine good faith of his neutrality and impartiality, we believe that the fundamental purpose of the Act is fulfilled."

In the case of *N. L. R. B.* v. *Duncan Foundry & Machine Works, Inc.*, 142 F. (2d) 594 (7th Cir.) at 596, the Court uses the following language:

> "True, the respondent did not circularize each member of the E. R. P. with notice of cessation of support of the E. R. P. However, we can not, nor can the Board, after seven years, say that it was necessary for respondent to follow any certain formal mechanical pattern of procedure in order to evince disestablishment, inasmuch as the evidence establishes beyond peradventure an honest, active and successful effort by respondent to effectuate its detachment and clear understanding of the attitude of the employer in this regard upon the part of the employees. * * * The undisputed facts here disclose realization of just such standard of conduct upon the employer's part,—an earnest, honest attempt to comply with the purposes and intent of the Act."

There is no merit to this first position of the Board given as a reason for the issuance of a Writ by this Court as the decision of the Circuit Court of Appeals for the Seventh Circuit in this instant case is not at variance with the decisions of the Courts of the other Circuits and of the Supreme Court.

II.

The Board assigns as its second reason why the Writ of Certiorari should issue from this Court the fact that

the Circuit Court of Appeals, in deciding this case, refused to approve the provision of the Board's Order which required the Company to cease and desist from dominating or interfering with the administration of the KEA and to refrain from recognizing the KEA in the event that organization returned to existence. The record discloses that in 1937 the KEA was dissolved. It passed out of existence. It was dead. The record failed to disclose any act by KEA as an organization or through any officer or committee thereof subsequent to the date of is dissolution. It seems rather unreasonable that the Board should state that a Certiorari should issue by this Court because the Circuit Court of Appeals failed to approve an Order requiring the Company to cease and desist from dominating or interfering with the administration of an organization which had been out of existence for a period of over seven years.

III.

The third reason urged by the Board, in its Petition before this Court and assigned as grounds for the issuance of the Writ of Certiorari, is that the Circuit Court of Appeals failed to approve the findings and order of the Board, directing the Company to amend its "no solicitation rule". The rule was originally initiated by the Company for an entirely different purpose; namely, to avoid solicitation of the sale of merchandise and chances among its employees. The rule that prohibits solicitation on Company premises is too broad, insofar as it applies to the discussion of Union activities of the employees. As we understand the law, it is not objectionable if Company employees, on Company premises, on their own time and while not working, discuss Union activities. The record unquestionably discloses that this "non-solicitation rule" was not enforced by the Company except upon the specific

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complaint of an individual employee to the management that such solicitation was interfering with his work (P. A. 215, 216, 240, 242, 262, 263). The Company maintained an absolutely neutral policy and acted on the few isolated, specific complaints made by employees, whether the complaint was against C. I. O. or Alliance solicitation. Certainly, the fact that the rule is too broad, where there is no discrimination in its enforcement, cannot be urged as a grounds for issuance of a Writ in this case. The time of this Court should not be taken up with such a position.

Conclusion.

The United States Circuit Court of Appeals for the Seventh Circuit, in rendering its opinion in this case, has given the record exhaustive and careful consideration. Its decision is based upon the law and the facts in the case and should not be disturbed. The three reasons assigned by the Board in its Petition before this Court, for the issuance of the Writ, are not sound and not based upon the law and the record in the case. The Petition for Writ of Certiorari, in this case, should be denied.

Respectfully submitted,

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